

Executive Order 008 on Voluntary Offshore Assets Regularization Scheme

Newsletter

KPMG in Nigeria

Overview of the Executive Order

His Excellency, President Muhammadu Buhari, GCFR, on 8 October 2018 signed Executive Order No. 008 ("the Order") authorizing the Attorney-General of the Federation and Minister of Justice to set up a Voluntary Offshore Assets Regularization Scheme in Switzerland (VOARS or "the Scheme"). The Scheme applies to all persons, entities and their intermediaries who hold offshore assets and are in default of their tax liabilities, including those who:

- (a) are not already under investigation by law enforcement agencies in Nigeria or any other country and have not been charged with any crimes;
- (b) own offshore assets (such as liquid assets, stocks and bonds held in portfolio, insurance policies, property assets, etc.) but are yet to declare them to relevant authorities;
- (c) earn income on offshore assets but are yet to declare such income to relevant tax authorities (RTAs);
- (d) are registered taxpayers who have additional disclosures to make or need to amend prior disclosures and/or are registered but have not been filing returns;
- (e) have not been fully declaring their taxable income and offshore assets, or have been underpaying or under-remitting taxes; and
- (f) are under a process of tax audit or investigation with the RTA and/or engaged in tax dispute with the RTA but are prepared to settle the tax dispute out of court.

The Scheme provides a one-year window commencing **8 October 2018**, during which affected taxpayers can declare their offshore assets and income from sources outside Nigeria that relate to the preceding 30 years of assessment, regularize their tax status and ensure full compliance.

To participate, eligible taxpayers must voluntarily make complete and verifiable disclosures of their offshore assets and income through the Voluntary Offshore Assets Regularization Facility in Switzerland (VOARFS) to be set up by the Federal Government of Nigeria (FGN). Such taxpayers are also expected to, amongst other things, pay a one-time levy of 35% of their offshore assets to the FGN in lieu of all outstanding taxes, penalties and interest; and ensure full tax compliance on their residual offshore assets after accessing the Scheme by paying taxes to the FGN.

In exchange, qualified taxpayers shall obtain permanent immunity from criminal prosecution for tax offences and offences related to offshore assets, waiver of interest and penalties on the declared and regularized offshore assets and waiver from tax audit of the declared and regularized offshore assets.

Any eligible taxpayer who fails to take advantage of the opportunity provided by the Scheme, shall upon its expiration be liable to pay in full, the principal tax liability due (inclusive of interest and penalties). The taxpayer may also be subject to comprehensive tax audit, investigation, charges and enforcement procedures concerning the offshore assets.

Matters arising

1. The VOARS applies to all persons, entities, and their intermediaries who hold offshore assets and are in default of their tax liabilities. This seemingly broad scope may be the subject of debate. However, given that the Order derives from the Constitution of the Federal Republic of Nigeria, and specifically refers in its recitals to "*taxpayers who are in default under all **relevant Statutes***" (emphasis ours), it is our view that the scope of the Scheme would be limited to persons who fall within the purview of Nigeria's constitutional and tax law provisions.
2. Under the Nigerian Personal Income Tax (PIT) Act, PIT is imposed on individuals who are resident or deemed to be resident in Nigeria or who derive income from the country¹, and not based on citizenship. Thus, non-resident Nigerians who own offshore assets or earn foreign income should not be affected by the Order. Foreign companies operating in Nigeria who own offshore assets or earn foreign income should also not be affected by the Order, based on extant provisions of the Companies Income Tax (CIT) Act.
3. Based on Section 13 of PIT Act, foreign-sourced incomes are not liable to PIT in Nigeria unless and until they are brought into or received in Nigeria. In essence, it is not illegal for Nigerian-resident individuals to earn legitimate foreign incomes or elect to retain such incomes abroad.

Broad exemptions also apply under Nigeria's income tax legislation to foreign incomes that are received in,

¹The exemptions to this rule are persons employed in the Nigerian Armed Forces and the Nigerian Police Force other than in a civilian capacity, and officers of the Nigerian Foreign Service.

or repatriated, to Nigeria. Specifically, the PIT Act exempts foreign passive incomes (i.e. dividend, interest, rent and royalties), fees and commissions earned by individuals, from PIT. The exemptions are applicable to the extent that such incomes are brought into Nigeria in foreign currencies and paid into a foreign domiciliary account in a Nigerian bank.

Similarly, dividend, interest, rent or royalty derived by a Nigerian company from a country outside Nigeria, and repatriated to Nigeria through government-approved channels, is exempt from CIT. There is no statutory timeline for this repatriation.

Furthermore, Nigeria has Double Taxation Treaties (DTTs) with countries such as the United Kingdom, Belgium, France, the Netherlands, Canada, Philippines, South Africa and Spain. These DTTs primarily allocate the right to tax residents of either of the Contracting States between Nigeria and each Contracting State. Thus, certain foreign incomes derived by Nigerian residents from the above Treaty Countries may not be taxable in Nigeria.

Consequently, the only foreign incomes that are subject to tax in Nigeria are the non-exempt incomes and those that are brought into Nigeria through unauthorized channels. VOARS is, therefore, unduly broad in this regard and cannot legislate taxation where none exists under the principal legislation

4. Aside from taxing foreign income, the Order seeks to tax offshore assets of affected taxpayers and criminalize such taxpayers for non-disclosure of the assets. The Order purportedly relies on a constitutional duty for *"every citizen to declare his/her income **and assets** fully and honestly to appropriate and lawful agencies and pay taxes promptly"* (emphasis ours). However, there is no mention of "assets" in the corresponding provision of Section 24(f) of the Nigerian Constitution. The constitutional requirement for asset declaration is limited to certain public office holders only and is not generally applicable to all citizens.

Furthermore, there is no provision in the Nigerian tax law that imposes tax on (offshore) assets in the manner in which the Order seeks to do. The PIT, CIT and Capital Gains Tax (CGT)

Acts impose tax on profits, incomes and chargeable gains. This calls to question the legal basis for the imposition of "asset levy" by the Order.

5. There are also concerns as to the basis for the 35% "asset levy" rate stipulated by the Order, considering that Nigeria has a standard CIT rate of 30% of taxable profits, a maximum effective PIT rate of 19% of chargeable income, and a CGT rate of 10% of chargeable gains. These concerns are exacerbated by the requirement for taxpayers who wish to take advantage of VOARS to make their disclosures through the VOARFS, and voluntarily elect to pay a 2% facility access fee, the base of which is unspecified. Assuming the fee would be computed on the offshore assets being disclosed, affected taxpayers would effectively be paying a whopping 37% of their offshore assets to regularize their tax affairs.
6. Another key issue is the relationship between the VOARS and the recently concluded Voluntary Assets and Income Declaration Scheme (VAIDS). By the VAIDS Order, taxpayers that took advantage of VAIDS to regularize their tax affairs (by paying their outstanding taxes for the 2011 to 2016 tax years) are entitled to tax immunity. The question is, would they again be required to make further declaration under VOARS for the 23 tax years (i.e., 1988 to 2010) not covered by VAIDS, since VOARS covers 30 years of assessment preceding 8 October 2018? This creates unnecessary uncertainty and anxiety for taxpayers and must be addressed to protect the integrity of Nigeria's tax system.
7. Closely related to the foregoing is the sheer administrative burden that VOARS has placed on affected taxpayers to retrieve information for the past 30 years. The six-year period covered by VAIDS was apt as it is consistent with the generally accepted limitation period in relevant provisions of Nigerian tax laws and the Companies and Allied Matters Act (section 332). Even with that, it was still challenging for some individual taxpayers who were not keeping appropriate records to retrieve the information required to make their VAIDS declaration. Thus, requiring any taxpayer to **fully and honestly** declare income for the preceding 30 years of assessment under VOARS Order will be a Herculean task.

8. There are legal and practical concerns as to whether State tax authorities will respect the tax exemptions and immunity granted to qualifying taxpayers under the Scheme. This is in light of the separation of legislative and taxing powers between the FGN and States. The experience of taxpayers who regularized their tax affairs under VAIDS, but were denied by some States of some of the privileges promised under the VAIDS Order, is still fresh in memory.
9. Besides, the question of the competent tax authority to administer taxes payable, or issue assessment notices under the VOARS is a potential conflict area considering the clear provisions of the enabling legislation conferring taxing powers on the Federal Inland Revenue Service (FIRS) and State tax authorities.
10. Finally, it is appropriate to ask how effective the VOARS would really be in improving tax compliance by defaulting taxpayers, as the Government is yet to prosecute any tax offender for non-compliance with VAIDS since 1 July 2018 when the scheme ended.

Conclusion

We note that the FGN's underlying objectives in launching VOARS are to promote voluntary tax compliance, expand Nigeria's tax base, boost government revenue, stem tax evasion, corruption and illicit financial flows, and inculcate the ethics of national responsibility, accountability and honesty in citizens. However, achieving these laudable objectives requires wholesale and coordinated tax reform programme rather than haphazard measures, such as VOARS. And where corruption and illicit financial flows are involved, VOARS will be counter-productive, if the perpetrators can be allowed to keep 65% of their loot on surrendering just 35% thereof!

The matters arising from VOARS provide a basis for further engagement between the FGN, States, tax practitioners and taxpayers with a view to finding the way forward in the quest by Government for revenue acceleration.

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